85-1760

No. _____

Supreme Court, U.S.
FILED
APR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

IN THE MATTER OF THE ESTATES OF
JOHN W. LEGGETT, Deceased, and
GRACE F. LEGGETT, Deceased.

RUDOLPH J. PAPALINI and JACQUELINE COWL,
Petitioners,

v

VASANTI FERRANDO FITHIAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER THE INTEGRITY OF LANGUAGE DISPOSING OF PROPERTY UNDER A WILL TO THE PETITIONERS IS CONSTITUTIONALLY PROTECTED AGAINST RETROACTIVE STATUTORY CHANGES IN THE MEANING OF DISPOSITIVE WORDS.

II.

WHETHER A STATUTORY CHANGE IN THE DEFINITION OF THE TERM "ISSUE" TO INCLUDE PREVIOUSLY EXCLUDED ADOPTED CHILDREN CAN BE APPLIED TO THE WILLS OF TESTATORS WHO DIED PRIOR TO THE ENACTMENT OF THE STATUTE.

III.

WHETHER THE MICHIGAN LEGISLATURE EXCEEDED ITS CONSTITUTIONAL AUTHORITY BY ENACTING A STATUTE WHICH PURPORTS TO CHANGE THE MEANING OF THE TERM "ISSUE" IN THE WILLS OF TESTATORS WHO DIED PRIOR TO ITS ENACTMENT.

IV.

WHETHER THE MICHIGAN SUPREME COURT ERRONEOUSLY AND IN VIOLATION OF THE CONSTITUTION CHANGED THE CONSTITUTIONALLY CORRECT RULE OF LAW SET FORTH IN *IN RE GRAHAM ESTATE*, 379 MICH 224; 150 NW2d 816 (1967), THAT THE TERM "ISSUE" AS USED IN A WILL RETAINS THE LEGAL MEANING WHICH IT HAD WHEN THE TESTATOR DIED AND CANNOT ACQUIRE A NEW MEANING UNDER A SUBSEQUENTLY ENACTED STATUTE.

LIST OF ALL PARTIES

All of the parties to this action are listed in the caption.

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No. ____

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IN THE MATTER OF THE ESTATES OF
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RUDOLPH J. PAPALINI and JACQUELINE COWL,
Petitioners,

v

VASANTI FERRANDO FITHIAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The Petitioners, Rudolph J. Papalini and Jacqueline Cowl, petition for a writ of certiorari to review the decision of the Supreme Court of the State of Michigan entered April 7, 1985, and its order denying a rehearing entered January 28, 1986.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Michigan reversing the Court of Appeals' judgment in favor of Petitioners appears in Appendix A to the Petition (beginning at page A-1), and is reported at 424 Mich 77 (1985). The opinion of the Michigan Court of Appeals is not reported and is set forth in Appendix B (begin-

ning at page B-1). The opinion of the Oakland County Probate Court is also not reported and is set forth in Appendix C (beginning at page C-1).

JURISDICTION

1. The judgment of the Supreme Court of Michigan was entered on April 7, 1985. (Appendix A, *infra*, page A-1). A petition for rehearing, timely filed, was denied on January 28, 1986. (Appendix D, *infra*, page D-1). The state court decision is final.

2. The jurisdiction of this Court is invoked under the Fifth and Fourteenth Amendments of the Federal Constitution and under 28 USC 1257(3). The Petitioners have been denied their property rights without due process of law by the Michigan Supreme Court decision which permitted the Legislature to change the meaning of dispositive words by statute.

3. The constitutional question was raised in the Probate Court, in the Michigan Court of Appeals, and in the Michigan Supreme Court by continued dispute over a central issue, the applicability of *In Re Graham Estate*, 379 Mich 224; 150 NW2d 816 (1967), which had held, "It was not competent for the legislature to change his will in that respect by statutory amendment adopted after his death." The excerpts from the record raising the constitutional questions are set forth in Appendix E, *infra*, pages E-1–E-6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. The Michigan statutes involved are set forth in Appendix F (beginning at page F-1). They are:

- 1957 PA 255; MCLA 710.9; MSA 27.3178(549)
- 1966 PA 128; MCLA 700.128; MSA 27.5128
- 1974 PA 296; MCLA 710.60; MSA 27.3178(550.60)

STATEMENT OF THE CASE

This case involves a legislative challenge to the fundamental structure of constitutional rights: the integrity of language. Constitutional rights are established and protected in words. If the legal meaning of words can be changed, the rights protected by them are illusory. There is no subject more universally important to constitutional law than the integrity of language. This Petition seeks a pronouncement by the United States Supreme Court on this important subject.

In this case the testators devised property to their "issue." When the wills were drafted and when the testators died the term "issue" excluded adopted descendants. Subsequent to their deaths, the Michigan Legislature enacted a statute which operates through a

mandatory and retroactive rule of construction to change the definition of "issue" to include adopted children. The Michigan Supreme Court ruled that this statute divests two natural grandchildren of one-half of the property and gives it to the adopted granddaughter who would have received nothing but for the statute adopted after the testators' deaths. The Michigan Supreme Court has permitted the state Legislature to change the disposition of property under the decedents' wills by a change in the meaning of words subsequent to their deaths.

This case concerns the relationship between the rule of construction set forth in MCLA 700.128; MSA 27. 5128 and the establishment of fixed dates for the definition of words set forth in *In Re Graham Estate*, 379 Mich 224; 150 NW2d 816 (1967). The statutory rule of construction purports to be applicable irrespective of the date the document was executed. The Court in *Graham* held that the meaning of words in a will becomes fixed on the date of the testator's death. In effect, under *Graham* the statute could only apply in those cases where the testator had not died prior to its enactment. In this case the Michigan Supreme Court changed the rule of law as set forth in the *Graham* decision. Because individuals have the right to rely upon the meaning of legal terms when they execute their wills, the Supreme Court of Michigan has deprived the testators and the Petitioners as their designated beneficiaries of property rights without due process of law by allowing the Legislature to change the established meaning of legal terminology.

This case originated in the Oakland County Probate Court upon the filing of a petition by Vasanti Ferrando Fithian seeking a determination of her status as a beneficiary of the trusts created under the wills of John W. Leggett and Grace F. Leggett. Both wills contained the

language set forth below relating to the distribution of trust income and is the only language in the wills that is relevant to this Petition.

> "(e) The trustee shall pay over the net income of the trust estate quarterly or oftener, in its discretion, as follows:
>
> "(1) To my daughters, Wilhelmina L. and Annabell L. in equal shares.
>
> "(2) Upon the death of one of my daughters, one-half to the surviving daughter and one-half to the issue of the deceased daughter, per stirpes, failing such issue to the surviving daughter.
>
> "(3) Upon the death of the said surviving daughter, to *my then living issue* per stirpes." (Emphasis provided.)

John W. Leggett and Grace F. Leggett had two natural children, Annabell L. Papalini and Wilhelmina L. Ferrando. Both natural children were designated income beneficiaries under paragraphs (e)(1) and (2) of their parents' wills. Annabell L. Papalini had two natural children, the Petitioners: Jacqueline Cowl and Rudolph J. Papalini. Upon the death of Annabell L. Papalini in 1974, the Petitioners became income beneficiaries under paragraph (e)(2) of the Leggett wills.

On July 17, 1940, Wilhelmina and her husband legally adopted Vasanti Ferrando Fithian, under the laws of the State of New York. In 1981, Wilhelmina L. Ferrando died, leaving Vasanti Ferrando Fithian as her only child. It became necessary to interpret and apply paragraph (e)(3) of the wills and the Fithian petitions were filed.

The Oakland County Probate Court granted the Fithian petitions on June 17, 1982. The Court applied the statute

and held that Vasanti Ferrando Fithian is "issue" under the wills of John W. and Grace F. Leggett and entitled to receive one-half of the net income from the trust, leaving the other half to be divided between the natural grandchildren of the decedents.

The constitutional issue in this case was first raised in the Oakland County Probate Court. The Fithian petition alleged that "a retrospective statute is unconstitutional only if it has the effect of depriving a person of a *vested* property right." The Petitioners responded that MCLA 700.128; MSA 27.5128 is a lawful exercise of the Legislature's power only if its application is limited to wills of testators who died after September 27, 1957. Otherwise, Petitioners, citing *Graham*, assert, "It is *not competent for the Legislature* to change his will in that respect by statutory amendments adopted after his death." (Emphasis supplied.)

The Petitioners again presented the issue of the constitutionality of MCLA 700.128; MSA 27.5128 in their appeal of the Probate Court decision to the Michigan Court of Appeals. Arguing that such retroactive application would exceed the authority of the Legislature, Petitioners presented the Court with a constitutional question.

The Court of Appeals reversed the decision of the Oakland County Probate Court by holding that the statutory presumption could not be applied retroactively. The Court found that on the date of the testators' deaths, the meaning of "issue" was unambiguous and did not include adopted children. Since there was no ambiguity on the date of the Leggett deaths, there was no reason to apply a rule of construction and the statute was inapplicable.

The Court of Appeals' decision correctly applied the principle of law set forth in *Graham* since the term

"issue" did not include adopted children when the wills were executed and when the testators died, the testators could not have intended "issue" to include adopted children.

The unanimous Michigan Supreme Court decision reversed the unanimous decision of the Court of Appeals.

Under the Supreme Court's interpretation of the statute, the term "issue" includes adopted children unless a contrary intent appears from the terms of the instrument. No exception was recognized if the testator's death occurred before the enactment of the statute. In the Leggett wills, the Court did not find a contrary intent expressed in the will which simply used the conventional terminology, "to my then living issue."

The Petitioners submitted a motion to the Michigan Supreme Court for a rehearing. The Petitioners argued that the Supreme Court decision had deprived the testators and the Petitioners as their designated beneficiaries of property rights without due process of law in violation of the State and Federal Constitutions. Unless words used in legal documents are given the meaning in effect when they are used, the rights established and protected by those words are in continuous jeopardy, subject always to the possibility of legislative change through language revision.

By executing their wills, the testators in this case undertook a constitutionally protected action regarding the disposition of their property upon their deaths. It would be unconstitutional and contrary to public policy to allow the Legislature to redefine their words, thus effectuating a different disposition of their property. Despite these arguments, the rehearing was denied by the Michigan Supreme Court on January 28, 1986.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT SHOULD AFFIRM THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN THE MEANING OF LANGUAGE WHICH DISPOSES OF PROPERTY. OTHERWISE, PERSONS CAN BE DEPRIVED OF PROPERTY BY LEGISLATIVE CHANGES IN THE DEFINITIONS OF WORDS.

This case presents issues of exceptional importance that should be decided by this Court. The right to own and dispose of private property without governmental interference is a constitutionally protected right, and the Legislature may not encroach upon that right without affording its citizens due process and just compensation. The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

This Court's definition of constitutionally protected property rights since the 1972 decision in *Board of Regents* v *Roth*, 408 US 564 (1972) has centered on the "entitlement" theory. The individual must be "entitled" to the property before the Court will recognize constitutional protection. This concept also encompasses the requirement that the person has already received the benefit or at least has a previously recognized claim of entitlement. *Roth* at 576. This Court in *Perry* v *Sindermann*, 408 US 593 (1972) recognized a protected property interest in employment if a person is currently working and the applicable law guarantees continued employment. This Court in *Matthews* v *Eldridge*, 424 US 319; 47 L Ed 2d 18; 96 S Ct 893 (1976), held that an individual's right to receive social security disability benefits is a statutorily created property interest protected by the Fifth Amendment. These decisions illustrate the Supreme Court's deter-

mination to protect not only traditional property ownership but also significant unconventional property interests.

Petitioners argue that the Court should use this case to declare that there is a constitutionally protected property right in the meaning of words which dispose of property. Words used in legal documents must retain the meaning in effect when they are used. In this case the integrity of the will and the express intent of the testators are manifestations of this right. Specifically, on the dates of the testators' deaths, the meaning of the term "issue" was unambiguous and excluded adopted children. As there existed no ambiguity when the wills became effective, there is no reason to apply a subsequently adopted statutory rule of construction. Instead, the decision of the Michigan Supreme Court would apply a statutory rule of construction which would change the clear and unambiguous meaning of the testators' wills, take property from the Petitioners, and give it to an adopted granddaughter.

II.

IT IS POSSIBLE TO RECONCILE THE STATUTE WITH THE CONSTITUTION BY IMPOSING A JUDICIAL QUALIFICATION ON THE APPLICABILITY OF THE STATUTE.

By examining the wording of MCLA 700.128; MSA 27.5128, and the holding in the *Graham* case, it is clear that there is no necessary conflict between the statute and the Constitution. The statute is applicable by its terms to documents "executed on, before, or after June 23, 1966." The Court in *Graham* sets forth that the statute cannot be applied to a will executed before June 23, 1966, if the testator had died prior to that date. Constitutional principles require the judicial imposition of the *Graham* qualification to the statute, but with that qualification the statute would be valid.

III.

THE CONSTITUTIONAL LIMITATIONS ON THE APPLICABILITY OF A STATUTORY RULE OF CONSTRUCTION SHOULD BE CLARIFIED.

MCLA 700.128; MSA 27.5128 sets forth a rule of construction which would include adopted children within the term "issue" where the statute is applicable. It is applicable, however, only in cases of ambiguity as to meaning or intent, and not in all cases. The Michigan Supreme Court in *In Re Butterfield Estate*, 405 Mich 702; 275 NW2d 262 (1979), stated at page 711, "the primary duty of any court faced with the task of resolving a disputed testamentary disposition is to effectuate as nearly as possible the intention of the testator. Where there is no ambiguity, that intention is to be gleaned from the four corners of the instrument . . . (citing cases), and the Court has merely to interpret and enforce the language employed." The Michigan Supreme Court in *Butterfield* expressly overruled the Court of Appeals' decision in the case, there entitled *Gowthorpe* v *Goodwin*, 72 Mich App 648; 250 NW2d 514 (1976), which had held that the term "issue" was an ambiguous term subject to construction. The Leggett wills use the term "issue" as a term of art with a clear and unambiguous meaning. Therefore, since the intent could be obtained from the four corners of the will, there is no need to apply the statutory rule of construction.

Prior to the 1957 amendments to the Michigan Adoption Code (1957 PA 255; formerly MCLA 710.9; MSA 27.3178(549), repealed and superseded by 1974 PA 296; MCLA 710.60; MSA 27.3178(550.60)), the term "issue" did not include adopted children. *Russell* v *Musson*, 240 Mich 631; 216 NW 428 (1927), involved a bequest to surviving "children" of the decedent's son. The Supreme

Court ruled that this bequest did not benefit adopted grandchildren. *In Re Chapple's Estate*, 338 Mich 246; 61 NW2d 37 (1953), covers the law on the subject from the 1927 *Russell* decision, *supra*, until 1953. The case involved two children adopted by the testator's natural daughter after his death and determined that the adopted grandchildren were not "issue" of their adopting parent and, therefore, not entitled to inherit. The Court noted the *Russell* decision, *supra*, and that the law has not been changed since 1927 by statute or court decision. *In Re Smith Estate*, 343 Mich 291; 72 NW2d 287 (1955), involved the status of an adopted child as a "lineal descendant" for inheritance tax purposes. The Court observed that as of 1955 the Michigan Legislature "has not yet seen fit to identify the adopted child exactly and precisely with the natural child" (*Smith*, at 297).

Following the *Smith* decision, the Michigan Legislature enacted the significant 1957 amendments to the Michigan Adoption code which were noted and discussed in *In Re Miner Estate*, 359 Mich 579; 103 NW2d 498 (1960). The 1957 amendments which had been in effect two weeks prior to the decedent's death controlled the decision in favor of an adopted child. The Court noted, "it appears clear that it is this statute which is controlling in our present case since it is the one which was in effect at the death of the intestate." Because of this timely change in the Adoption Code it was ruled that the contestant was a lawful lineal descendant of his adoptive grandmother, and was, therefore, an interested party for purposes of a will contest.

In Re Graham Estate, 379 Mich 224; 150 NW2d 816 (1967), concisely described the 1957 change in the law as follows:

> "At the time of the testator's death, in 1926, as also of the making of his will in 1925, it was the

> law in Michigan that the term 'issue' used in a last will and testament did not include an adopted child . . . (citing cases). In 1957 . . . the legislature adopted an amendment to the adoption statutes . . . (cited) to provide, in effect, that thereafter the term 'issue' should include an adopted child."

The decision in *Graham* is on all fours with this case, and requires that the term "issue" in the Leggett wills be given the meaning which it had in 1939 and 1944, the years of their deaths, when "issue" did not include adopted children. The *Graham* decision, *supra*, ruled as follows:

> "The . . . situation presents the question, then, whether the testator's intent as to inclusion of an adopted child within the meaning of the term 'issue' is to be determined according to the law in effect at the time of the testator's death or at the time of the death of the life beneficiary."
>
> * * *
>
> "The intent of the testator must be held to have been what the words employed in his will meant at the time of his death. *It was not competent for the legislature to change his will in that respect by statutory amendment adopted after his death.*" (Emphasis supplied.)

CONCLUSION

The decision in *Graham* correctly rules that the meaning of words becomes fixed when a testator dies and cannot later be given a different meaning even if the definitions are changed later by statute. The law as expressed in *Graham* established constitutionally protected property rights under a testamentary disposition of property to "issue" as defined when the testators died. When the Leggetts died, the term "issue" as used in their wills excluded adopted children. Their intent, as reflected by the usage and meaning of words in their wills, was to exclude Vasanti Ferrando Fithian. Since the term "issue" was unambiguous in the Leggett wills, and became fixed in meaning on the dates of their deaths, a rule of construction subsequently enacted cannot change the meaning of their wills without violating the Constitution.

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari shall issue to review the judgment and opinion of the Michigan Supreme Court.

Respectfully submitted,

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Dated: April 21, 1986

APPENDICES

• • •

APPENDIX A

OPINION

(State of Michigan — Supreme Court)

(*Entered* April 7, 1985; *Filed* December 5, 1985)

(IN THE MATTER OF THE ESTATES OF JOHN W. LEGGETT, Deceased, and GRACE F. LEGGETT, Deceased; VASANTI FERRANDO FITHIAN, Plaintiff-Appellant, v RUDOLPH J. PAPALINI and JACQUELINE COWL, Defendants-Appellees — No[s]. 72968, 72969)

NOTE: *Where possible, a syllabus (headnote) such as this will be released at the time the opinion is released. This syllabus is not a part of the opinion of the Court but has been written by the Reporter of Decisions as a summary of the case for the convenience of readers. See United States v Detroit Lumber Co, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).*

In re LEGGETT ESTATES
FITHIAN v PAPALINI

Docket Nos. 72968, 72969. Argued April 2, 1985 (Calendar No. 7). — Decided December 5, 1985.

Vasanti F. Fithian petitioned the Oakland Probate Court, seeking a determination of her status as a beneficiary of trusts created by the wills of John W. Leggett and Grace F. Leggett who died in 1939 and 1944, respectively. Each trust provided that the trust income was to be paid equally to the Leggetts' daughters, Wilhelmina and Annabel [sic], *and that upon the death of either of the daughters one-half of the income was to be paid to the survivor and one-half to the issue of the deceased daughter per stirpes. Upon the death of the surviving daughter, payment was to be made to the Leggetts' living issue per stirpes. Both daughters died; Wilhelmina had survived Annabel* [sic]. *Vassanta* [sic] *Fithian had been*

adopted by Wilhelmina in 1940. The probate court, Norman R. Barnard, J., applied the statutory presumption in favor of including adopted persons in a class of beneficiaries where there is no express intent of a testator or settlor to the contrary. There was no such presumption in the statutes before 1966. The Court of Appeals, Bronson, P.J., and MacKenzie and J. H. Gillis, JJ., reversed in an unpublished opinion per curiam, concluding that the statutory presumption did not apply retroactively in this case (Docket Nos. 65287, 65288). The plaintiff appeals.

In a unanimous opinion by Justice Levin, the Supreme Court held:

The term "issue" in a will or trust agreement must be construed to include any adopted person.

1. Section 128 of the Revised Probate Code supplanted the common-law rule of construction that provided for different treatment of adopted persons. Read together with § 60, § 128 leaves no doubt that an adopted child is to be treated in all respects the same as a child who is not adopted. Under § 128, the term "issue" includes any adopted person unless a contrary intention appears by the terms of the instrument or the estate devised vested before June 23, 1966. The language is mandatory and leaves no room for a court to carve out an exception for a case where the settlor's death preceded the enactment of the statute.

2. In this case, no contrary intention appears by the terms of the instrument, and the estate devised to the adopted child did not vest before June 23, 1966. Thus, the rule of construction provided by § 128 governs.

Reversed.

Levin, J.

In 1936, John and Grace Leggett executed wills with pour-over trust provisions, leaving trust income to their daughter, Wilhelmina Leggett Ferrando, for life, with the remainder to her "issue."[1] In 1939, John died, and

---

[1] The last wills and testaments of John and Grace Leggett provide:

"(e) The trustee shall pay over the net income of the trust estate quarterly or oftener, in its discretion, as follows:

(*continued on following page*)

in 1944, Grace died. Wilhelmina received the trust income until her death in 1981. The question is whether Vasanti Ferrando Fithian, who was adopted by Wilhelmina in 1940, may, pursuant to § 128 of the Revised Probate Code, take as "issue" of Wilhelmina. We hold that Vasanti takes as issue.

The probate code found that § 128, read together with § 60 of the Revised Probate Code,[2] leaves "no doubt that

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(*continued from preceding page*)

(1) To my daughters, *Wilhelmina* L. and Annabell L. in equal shares.

(2) Upon the death of one of my daughters one-half to the surviving daughter and one-half to the *issue* of the deceased daughter, per stirpes, failing such issue to the surviving daughters.

(3) Upon the death of the said surviving daughter, to my then living issue per stirpes." (Emphasis added.)

[2] "Sec. 60. (1) After the entry of the order of adoption, the adoptee shall, in case of a change of name, be known and called by the new name. The person or persons adopting the adoptee shall thereafter stand in the place of a parent or parents to the adoptee in law in all respects as though the adopted person had been born to the adopting parents and shall thereafter be liable for all the duties and entitled to all the rights of parents.

(2) After entry of the order of adoption there shall not be any distinction between the rights and duties of natural progeny and adopted persons, and the adopted person shall become an heir at law of the adopting parent or parents, and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, an adopted child shall no longer be an heir at law of a parent whose rights have been terminated under this chapter or chapter XIIA or the lineal or collateral kindred of that parent, nor shall an adopted adult be an heir at law of a person who was his or her parent at the time the order of adoption was entered or the lineal or collateral kindred of that person, except that a right, title, or interest vesting before entry of the final order of adoption shall not be divested by that order." (Emphasis added.) 1957 PA 255, now MCL 710.60; MSA 27.3178(555.60).

an adopted child is to be treated in all respects the same as a natural child", and held that Vasanti takes as "issue." The Court of Appeals, relying in part on *In re Graham Estate*, 379 Mich 224; 150 NW2d 816 (1967), reversed, saying that, because the Leggetts had died before the enactment of § 128, they should be presumed to have intended the meaning given the term "issue" at the times of their deaths. We agree with the probate court, and reverse the decision of the Court of Appeals.

Before the enactment of §§ 60 and 128, rules of construction were developed to determine the settlor's "intent" [3] when intent was not clear. The term "issue" is unclear.[4] A rule of construction developed that the term "issue" did not include adopted children. *Graham, supra*, p 227. Another rule of construction provided that the meaning of a term in a will is to be "determined according to the law in effect at the time of the testator's death." *Graham, supra*, p 226. [5] Both

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[3] "Intent" is a legal term of art. While "actual" intent is considered, perhaps more important, as a practical matter, are the "presumptions of intent" and the rules of construction. See, *In re Graham Estate, supra*, pp 226-227.

[4] Appellees argue that the term "issue" was clear at the time of the Leggetts' deaths and is, thus, not in need of construction. The term itself, however, is unclear and becomes clear only when coupled with the rule of construction that provided the term "issue" excluded an adopted person. While, at some point, a previously unclear term may acquire the "clear" meaning of its associated rule of construction, in light of the legislative determination that the term "issue" needs "construction," that cannot be said here.

[5] Several courts have, however, held that, because statutes are subject to change, the testator:

> "must be presumed, in the absence of any contrary context in the will, to have intended that the statutes in effect at the time the gift became operative to be those to be resorted to in determining the membership of the class. *Lincoln* v *Aldrich*, 149 Mass 368; 21 NE 671 [1889]; *Re Battell's Will*, 286 NY 97; 35 NE2d 913; 139 ALR 1100 [1941]; *reh den* 286 NY

(*continued on following page*)

rules of construction were "in effect" at the time of the Leggetts' deaths.[6]

In 1966, the legislature restricted the application of these common-law rules of construction by enacting § 128:

> "In the construction of a trust agreement or will, whether *executed on, before, or after June 23, 1966*, the term 'child', 'grandchild', 'issue', 'heir', 'descendant', 'beneficiary' or other equivalent term *shall* be construed to include any adopted person and his descendants whether natural or adopted *unless* a contrary intention appears by the terms of the instrument or *unless* the estate devised to the 'child', 'grandchild', 'issue', 'heir',

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(*continued from preceding page*)

> 722; 37 NE2d 454; 139 ALR 1107 [1941]; *Gilliam* v *Guaranty Trust Co*, 186 NY 127; 78 NE 697 [1906] (*dictum*); *DeWolf* v *Middleton*, 18 RI 810; 26 A 44 [1893]; 31 A 271 [1895]." 80 Am Jur 2d, Wills, § 1422, p 497, n 42.

In certain circumstances, courts determine the meaning of a term according to the law in effect at the time the will was signed. See, 80 Am Jur 2d, Wills, § 1123, p 233, n 34 and cases cited therein. See also, *In re Hund Estate*, 395 Mich 188; 235 NW2d 331 (1975) (Coleman, J., *dissenting*.)

The Uniform Probate Code § 2-602 and MCL 700.133; MSA 27.5133 both provide that a testator may select the law which is to apply in the interpretation of his will.

[6] When the rule of construction providing that a term must be defined according to the law in effect at the time of the settlor's death applies, it "attaches" to a will or trust the law, including other rules of construction, in force at the time of the settlor's death. Because this rule is a rule of construction, and not a substantive rule of law, it applies, however, only when a will or trust is construed, and does not, itself, "attach" to a will or trust upon the instrument's execution or even necessarily upon the settlor's death. Here, the term "issue" required construction only when the gift became operative in 1981 upon Wilhelmina's death. Although this rule of construction may, in an abstract sense, have been "in effect" when the Leggetts died, it did not apply to the gift in question until 1981 — fifteen years after the enactment of § 128.

> 'descendant', 'beneficiary' or equivalent person vested before June 23, 1966, in an already ascertained person or persons who have an immediate indefeasible right of enjoyment or a present indefeasible fixed right of future enjoyment in the estate." (Emphasis added.) 1966 PA 128, now MCL 700.128; MSA 27.5128.

In the instant case, because no "contrary intention appears *by the terms* of the instrument", (emphasis added) and because, in contrast with *Graham, supra,*[7] the estate devised to the issue of Wilhelmina did not "vest" before June 23, 1966, in an already ascertained person who had an "indefeasible" right of enjoyment, the statutory rule of construction set forth in § 128 governs.

While section 128 supplanted the common-law rule of construction that accorded different treatment to adopted persons (*In re Maloney Trust*, 423 Mich __; __ NW2d __ [1985]), it does not expressly repudiate the common-law rule of construction that the settlor's intent is to be determined by looking at the law in effect at the date of the settlor's death. Appellees contend that this common-law rule should be harmonized with § 128 by excluding from the scope of § 128 cases in which the settlor's death preceded the enactment of § 128.

Section 128 provides that the term "'issue' . . . *shall* be construed to include *any* adopted person." (Emphasis supplied.) This language is mandatory and leaves no room for a court to carve out an exception for a case where the settlor's death preceded the enactment of § 128.

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[7] In *Graham, supra,* the devise vested before June 23, 1966, thus taking it out of the scope of § 128.

Although § 128 was first enacted a year before *Graham* was decided, there is no reference to this enactment in *Graham*.[8] *Graham* considered § 60, stating that an adopted child shall "become an heir at law of the adopting parent or parents." Section 60 did not state, as does subsequently enacted § 128, a rule of construction of a trust agreement or will that an adopted child is "issue" unless certain explicitly stated exceptions are applicable; wills of settlors dying before the enactment of § 128 are not so excepted. The statement in *Graham, supra*, p 228, that "[i]t was not competent for the legislature to change his will in that respect by statutory enactment adopted after his death" spoke in "respect" to § 60, and not to § 128 which was not considered in *Graham*.

Reversed.

/s/ Charles L. Levin
/s/ Patricia J. Boyle
/s/ Michael F. Cavanagh
/s/ James L. Ryan
/s/ Dorothy Comstock Riley
/s/ James H. Brickley
/s/ G. Mennen Williams

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[8] See n 7.

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Filed August 25, 1983)

(In the Matter of the Estates of JOHN W. LEGGETT, Deceased, and GRACE F. LEGGETT, Deceased; VASSANTA FERRANDO FITHIAN, Plaintiff-Appellee, v. RUDOLPH J. PAPALINI and JACQUELINE COWL, Defendants-Appellants — Docket Nos. 65287; 65288)

BEFORE: **S. J. Bronson**, P.J.;
B. B. MacKenzie and **J. H. Gillis**, JJ.

PER CURIAM

The testators, John W. Leggett and his wife, Grace F. Leggett, died in 1939 and 1944, respectively. Each of their wills was executed in 1936. The wills left testamentary trusts designating that upon the death of one of their two daughters, certain trust income was to go to the "issue" of the deceased daughter; the will went on to provide that upon the death of the surviving daughter, trust income was to go to the testators' living "issue". The first of the daughters, Annabell, died in 1974. The surviving daughter, Wilhelmina, and her husband legally adopted appellee Vassanta Ferrando Fithian in 1940. Wilhelmina died in 1981.

When Wilhelmina died, plaintiff was her only child. Plaintiff filed petitions in probate court seeking a determination that she was entitled to trust income. Defendants, the children of the testators' other daughter, Annabell, opposed plaintiff's petition, on the basis that plaintiff was not "issue" within the meaning of the will. The probate court found that plaintiff was entitled to trust income. We reverse.

The law governing the meaning of the term "issue" as used in the will must be that which was in effect at the time of the testators' death, see *In re Graham Estate*, 379 Mich 224, 228; 150 NW2d 816 (1967). Prior to certain statutory amendments in 1957 and 1966, the term "issue" did not include adopted children. Accordingly, in *Graham Estate, supra*, the Court held that the term "issue" did not include adopted children where the term was used in a will executed in 1925, and where the testator had died in 1926, more than thirty years before the first legislation proposing to place adopted children on an equal footing with natural children. In the present case, the operative facts are identical. The applicable wills were executed in 1936, long before the enactment of any remedial legislation favoring adopted children. More important, the testators had both died by 1944. It is apparent that in the present case, the testators could not conceivably have intended that the term "issue" should include adopted children such as plaintiff. Since there is no ambiguity in the meaning of the term "issue", as that term was understood when the testators died, there was no need to resort to any external rules of construction such as the statute relied upon by plaintiff and the probate court, MCL 700.128; MSA 27.5128.

MCL 700.128; MSA 27.5128 does not compel a contrary result, merely because it states its applicability to wills executed before June 23, 1966, the effective date of its identical predecessor, the former MCL 702.14a; MSA 27.3178(84a). Defendants do not rely solely upon the fact that the wills were executed before the statutory enactment, but instead on the more crucial fact that the testators had both died before the enactment of any legislation favoring adopted children such as plaintiff. Although the language of MCL 700.128; MSA 27.5128 leaves room for changes in the meaning of certain terms following the *execution* of a will containing those terms,

it does not purport to change the meaning of terms from that which prevailed at the time of the testators' death.

The Court in *Graham Estate* apparently followed a similar line of reasoning. At the time of the decision in that case, June, 1967, the enactment relied on by plaintiff had been in effect for at least a year, yet the Court neither mentioned it nor relied upon it in rendering its decision. In other words, even though the will in *Graham Estate* had been executed in 1925, and even though the predecessor to MCL 700.128; MSA 27.5128, indicating its applicability to wills executed before June, 1966, had been in effect for a year, the Court in *Graham Estate* found no basis whatsoever to apply that section. Instead, the Court based its decision on the fact that "the death of the testat(or) preceded the statutory amendment" which was before the Court in that case.

Plaintiff and the probate court misplace reliance upon a recent decision of this Court, *In re Wallin Estate*, 88 Mich App 775; 279 NW2d 310 (1979). In that case, this Court applied the predecessor of MCL 700.128; MSA 27.5128 to a will even though the testator had died prior to the effective date of the enactment. We note at the outset that *Wallin* may be inconsistent with the holding in *Graham* that the meaning of terms must be construed as of the time of the testator's death. However, even if *Wallin* is a valid decision, we find it distinguishable, in that there the adoption occurred prior to execution of the will, whereas here, the adoption in question took place not only after the execution of both wills, but also after one of the testators had died. In *Wallin*, the fact that the adoption had preceded by ten years the execution of the will was by itself sufficient to create an ambiguity in the meaning of the terms of the will. The testatrix in that case might have developed the belief that the adopted person would qualify as "issue",

entitled to share in her estate; the fact that this person was long present as the potential object of her bounty at least raised an inference that she intended him to benefit from her will, despite the otherwise established principle that the term "issue" did not include adopted persons. Under the circumstances, an ambiguity was arguably created, which permitted resort to the predecessor of MCL 700.128; MSA 27.5128.

In the present case, where there had been no adoption when the wills were executed, the testators could not similarly have had any particular adopted person in mind when using the term "issue". More important, at least one of the testators, John W. Leggett, died a year before plaintiff's adoption; it is apparent that he never had any opportunity to even *consider* including plaintiff as prospective "issue". Since his will was mutual with and identical to, that of his wife, Grace Leggett, it is apparent that the meaning of terms in each was intended to be identical, so that the latter will must also be construed as having been drafted without any consideration of plaintiff as a potential beneficiary entitled to qualify as "issue".

The Court in *Wallin* specifically noted that "the time of adoption is a relevant factor in determining the intent of the testator." 88 Mich App 779, n 2. Remarkably, the Court in that case expressly distinguished *Graham Estate, supra,* on the basis that the child in question was adopted after execution of the will, whereas in *Wallin,* the child was adopted ten years prior to the execution of the will. *Id.* We believe that this distinction remains dispositive and compels the conclusion that under the circumstances of this case, there was no ambiguity whatsoever in the testators' use of the term

"issue".[1] Accordingly, the probate court erred reversibly in applying the rule of construction contained in MCL 700.128; MSA 27.5128. The order declaring that plaintiff qualifies as "issue" must be reversed.

Reversed.

/s/ S. Jerome Bronson
/s/ Barbara B. MacKenzie
/s/ John H. Gillis

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[1] The present decision is consistent with that rendered in *Dodge Trust*, 121 Mich App 527; ___ NW2d ___ (1982), where this Court declined to apply MCL 700.128; MSA 27.5128 in favor of adopted children claiming as "heirs" of the deceased. The Court based its decision on its finding that application of the statute to include the adopted children would have impaired the vested rights of other "heirs" in the estate, 121 Mich App 566-567. However, the fact that *Dodge* was decided adversely to the adopted claimants is also consistent with the holding in *Graham, supra*, because in each case the testator executed his will many years before the adoption in question took place. Accordingly, in *Dodge*, as in *Graham* and the present case, there was no basis for any inference that the testator had intended to include the adopted claimants as "heirs" when he drafted his will.

APPENDIX C

MEMORANDUM OPINION AND ORDER RE: BENEFICIARY

(State of Michigan — Probate Court — County of Oakland)

(Dated June 17, 1982)

(IN THE MATTER OF THE ESTATES OF JOHN W. LEGGETT, DECEASED — NO. 38,343; GRACE F. LEGGETT, DECEASED — NO. 47,278)

At a session of said Court in the Courthouse in the City of Pontiac, Oakland County, Michigan on June 17, 1982.

PRESENT: HONORABLE **NORMAN R. BARNARD**
Judge of Probate

This matter came on for hearing on May 27, 1982 on the Petition of Vasanti Ferrando Fithian for Determination Of Status As A Beneficiary. Petitioner's petition seeks a determination that she is "issue" of her deceased mother, Wilhelmina L. Ferrando, for purposes of application of the following provision of the Will of the decedents:

> "(e) The trustee shall pay over the net income of the trust estate quarterly or oftener, in its discretion, as follows:
>
> (1) To my daughters, Wilhelmina L. and Annabell L. in equal shares.
>
> (2) Upon the death of one of my daughters one-half to the surviving daughter and one-half to the issue of the deceased daughter, per stirpes, failing such issue to the surviving daughter.

(3) Upon the death of the said surviving daughter, to my then living issue per stirpes."

The facts have been stipulated to by the parties. John W. Leggett died on March 16, 1939, leaving a Last Will and Testament dated August 13, 1936. Grace F. Leggett died on September 13, 1944, leaving a Last Will and Testament dated August 14, 1936. Both wills contained the provision referenced above. Wilhelmina L. Ferrando was the daughter of John W. and Grace F. Leggett, and a life income beneficiary of the above trust. Wilhelmina L. Ferrando and her husband duly adopted the Petitioner, Vasanti Ferrando Fithian (named in the adoption order as Vassanta) under the laws of the State of New York. On January 2, 1981, Wilhelmina L. Ferrando died, leaving Vasanti Ferrando Fithian as her only child.

Annabell Papalini was the daughter of John W. and Grace F. Leggett, and a life income beneficiary of the Trust. She had two children: Jacqueline Cowl, who was born August 9, 1927, and Rudolph J. Papalini, who was born February 4, 1930. Annabell Papalini died on January 13, 1974, leaving said children, who are accordingly parties interested in this petition.

The question before the Court, as stipulated to by the parties, is whether Vasanti Ferrando Fithian is "issue" of Wilhelmina L. Ferrando, for purpose of application of the relevant statute. If she is, she is entitled to receive from the Trust one-half (½) of the net income thereof. If she is not, Rudolph J. Papalini and Jacqueline Cowl are entitled to receive the entire income thereof.

The sole objective in an action for construction of a will is ascertainment and effectuation of the intent of the testator as it appears from the language of the instrument. *In re Hund Estate*, 395 Mich 188 (1976). The testamentary provisions in the present case clearly indi-

cate an intent to treat each of John W. and Grace F. Leggett's grandchildren alike.

Arguably, however, John W. and Grace F. Leggett's intent in using the term "issue" is ambiguous since one of their grandchildren was adopted. Resort to the rules of construction is only permitted when the testator's intent is not clearly expressed in the face of the will. In light of the arguable ambiguity of the will's language in the present case, the Court is within its authority in resorting to and applying the statutory rules of construction in an attempt to ascertain the intention of the testators. *In re Hund Estate,* supra, at 196. *In re Wallin Estate,* 88 Mich App 775 (1979).

Jacqueline Cowl and Rudolph J. Papalini (natural grandchildren of the decedents) argue, however, that *In re Graham Estate,* 379 Mich 224 (1967), controls the decision that the Court must make in this case. In that case the testator died in 1926 leaving a will executed in 1925. In the will he established a trust for the benefit of his niece for his lifetime. Upon the death of the life beneficiary the trust corpus was to be distributed to the niece's "issue" by right of representation. The niece died in 1963 leaving only an adopted son born in 1926 (3 months after the testator's death) whom the niece had adopted in 1928. The question before the Court was the manner of determining the intent of the testator. The Court looked to the *Russell* rule of construction in determining what the intent of the testator was. The rule of *Russell* v. *Musson,* 240 Mich 631 (1927), stated, "There is nothing in the will which indicates that testator intended they should be included. In view of this we must hold that adopted children do not satisfy that provision of will." *Russell* v. *Musson,* supra, at 634.

It is important to remember that a rule of construction is a decision as to evidentiary significance, and as to what constitutes proof. What the Legislature has done is

to change the *Russell* rule. The Legislature has assimilated the position of the adopted child completely to that of the natural child by its enactment of MCL 700.128 and by its enactment of MCL 710.60.

MCL 710.60 provides in pertinent part:

> "(2) After entry of the Order of Adoption there shall not be any distinction between the rights and duties of natural progeny and adopted persons, and the adopted person shall become an heir at law of the adopting parent or parents, and an heir at law of the lineal and collateral kindred of the adopting parent or parents . . ."

Clearly, the Legislature's intent was to treat adopted persons on an equal basis with natural progeny.

The Legislature in 1966 enacted MCL 700.128, being Section 128 of the Revised Probate Code, which provides as follows:

> "In the construction of a trust agreement or will, whether executed on, before, or after June 23, 1966, the term "child," "grandchild," "issue," "heir," "descendant," "beneficiary," or other equivalent term shall be construed to include any adopted person and his descendants whether natural or adopted unless a contrary intention appears by the terms of the instrument or unless the estate devised to the "child," "grandchild," "issue," "heir," "descendant," "beneficiary," or equivalent person vested before June 23, 1966, in an already ascertained person or persons who have an immediate [indefeasible] right of enjoyment or a present indefeasible fixed right of future enjoyment in the estate."

By so enacting this statute, the Legislature followed the recommendation of the Supreme Court in *In re Smith's*

Estate, 343 Mich 291 (1955). In that case, the Supreme Court while addressing the issue of preferential treatment under our inheritance tax statute, spoke of the differences between an adopted and natural child.

> "It lies within the province of the Legislature, not of this Court, to assimilate the position of the adopted child completely to that of the natural child, . . ." *In re Smith's Estate*, supra, at 299.

Clearly, had the Legislature intended the Statute to apply only to wills of testators who died after June 23, 1966, that would have been simple to say.

The above two statutes, read together, leave no doubt that an adopted child is to be treated in all respects the same as a natural child. When construing a will, two exceptions exist which may prevent the similar treatment of an adopted child and a natural child. Neither of the two exceptions in MCL 700.128 apply here, however. First, there is nothing in John W. or Grace F. Leggett's will which indicates an intention to exclude Vasanti Ferrando Fithian from receiving trust property upon her mother's death. The second exception also doesn't apply since the language of the will specifically requires survival of one of the daughters. The pertinent language is:

> "Upon the death of the surviving daughter, to my *then living issue* per stirpes." (Emphasis added.)

According to the will, no issue can be paid trust assets (excluding (e)(2)) until the death of the surviving daughter, and at that point, only the *then living issue* can receive payment. Therefore, Jacqueline Cowl and Rudolph J. Papalini did not have a vested right in the entire trust fund. They could never have an "immediate indefeasible right of enjoyment or a present indefeasible

fixed right of future enjoyment" until the death of Wilhelmina L. Ferrando.

Therefore, MCL 700.128 applies here and is constitutional in its application. The Michigan Court of Appeals in *In re Wallin Estate,* supra, at 780, stated that:

> "We find nothing constitutionally infirm in the above statute. The Legislature's intent that the Statute is to be applied retroactively is absolutely clear. There is express provision for protection of vested rights. *In re Davis' Estate,* 330 Mich. 647 (1951)."

The Court has considered all of the foregoing in arriving at the opinion and order herein entered.

The Court makes the following findings and Orders:

That Vasanti Ferrando Fithian is "issue" under the wills of John W. and Grace F. Leggett.

That she is entitled to receive from the trust one-half (½) of the net income thereof.

It is so ordered.

/s/ NORMAN R. BARNARD
Judge of Probate

APPENDIX D

ORDER DENYING REHEARING

(State of Michigan — Supreme Court)

(Dated January 28, 1986)

(Rehearing No. 160 – IN THE MATTER OF THE ESTATES OF JOHN W. LEGGETT, Deceased, and GRACE F. LEGGETT, Deceased; VASANTI FERRANDO FITHIAN, Plaintiff-Appellant, v RUDOLPH J. PAPALINI and JACQUELINE COWL, Defendants-Appellees — SC 72968, 72969; CoA 65287, 65288; LC 38,343 & 47,278)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of January in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable: **G. MENNEN WILLIAMS**, Chief Justice; **CHARLES L. LEVIN**, **JAMES H. BRICKLEY**, **MICHAEL F. CAVANAGH**, **PATRICIA J. BOYLE**, **DOROTHY COMSTOCK RILEY**, **DENNIS W. ARCHER**, Associate Justices.

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

Archer, J., not participating.

(Certification Omitted in Printing)

APPENDIX E

EXCERPTS FROM THE RECORD RAISING THE CONSTITUTIONAL QUESTIONS

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1. *PROBATE COURT ORDER AFFIRMING CONSTITUTIONALITY OF STATUTE AS APPLIED, AT E-1.*

2. *RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR DETERMINATION OF STATUS AS BENEFICIARY SUBMITTED TO THE OAKLAND COUNTY PROBATE COURT, AT E-2.*

3. *PETITIONER'S BRIEF IN OPPOSITION TO PETITION FOR DETERMINATION OF STATUS AS BENEFICIARY AND FOR REAFFIRMANCE OF THE ORDER ENTERED ON NOVEMBER 12, 1980, SUBMITTED TO THE OAKLAND COUNTY PROBATE COURT, AT E-3.*

4. *PETITIONER'S BRIEF SUBMITTED TO THE MICHIGAN COURT OF APPEALS, AT E-4.*

5. *PETITIONER'S MOTION FOR REHEARING, SUBMITTED TO THE MICHIGAN SUPREME COURT, AT E-5.*

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1. PROBATE COURT ORDER AFFIRMING CONSTITUTIONALITY OF STATUTE AS APPLIED.

* * *

Therefore, MCL 700.128 applies here and is constitutional in its application. The Michigan Court of Appeals in *In re Wallin Estate*, supra, at 780, stated that:

> "We find nothing constitutionally infirm in the above statute. The Legislature's intent that the Statute is to be applied retroactively is absolutely clear. There is express provision for protection of vested rights. *In re Davis' Estate*, 330 Mich. 647 (1951)."

The Court has considered all of the foregoing in arriving at the opinion and order herein entered.

The Court makes the following findings and Orders:

That Vasanti Ferrando Fithian is "issue" under the wills of John W. and Grace F. Leggett.

That she is entitled to receive from the trust one-half (½) of the net income thereof.

It is so ordered.

/s/ NORMAN R. BARNARD
Judge of Probate

• • •

2. RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR DETERMINATION OF STATUS AS BENEFICIARY SUBMITTED TO THE OAKLAND COUNTY PROBATE COURT.

* * *

A retrospective statute is unconstitutional only if it has the effect of depriving a person of a *vested* property right. If a statute disturbs a vested right, it violates the requirements of due process. If it does not disturb a vested right, the legislation is constitutionally sound and within the scope of legislative power. MCLA 700.128 contains its own protection against unconstitutionality. The legislature very carefully limited application of the statute to those situations where no vested rights are affected. Moreover, it is clear that the legislature may enact rules of evidence which are effective in construing wills which were executed before the effective date of the legislation. *In re Hund Estate*, 395 Mich 188, 235 NW2d 331 (1975). Thus, the Statute does not fail because of the second exception.

* * *

3. PETITIONER'S BRIEF IN OPPOSITION TO PETITION FOR DETERMINATION OF STATUS AS BENEFICIARY AND FOR REAFFIRMANCE OF THE ORDER ENTERED ON NOVEMBER 12, 1980, SUBMITTED TO THE OAKLAND COUNTY PROBATE COURT.

* * *

1966 PA 128 purports to apply to any trust agreement or will, "whether executed on, before, or after June 23, 1966 . . ." Said act cannot apply to the facts of this case for two reasons.

First, 1966 PA 128 (MCLA 700.128, MSA 27.5128) is patently unconstitutional if it is read to apply to the construction of wills of testators who died before September 27, 1957, the effective date of 1957 PA 255, the amendatory act to the Adoption Code which ended the then remaining distinctions between natural and adopted children. If the statute is so read it is a retrospective law which directly violates the rule of the line of Supreme Court cases which uniformly declare that the intent of the testator in naming beneficiaries is measured by the law which exists at the time of his death. The Supreme Court pointedly and emphatically declared in *In re Graham Estate*, 379 Mich at p 228: "It was not competent for the legislature to change his will in that respect by statutory amendment adopted after his death." In that case the Supreme Court concluded that the 1957 amendments had prospective application. *Id*, at p 226.

* * *

4. PETITIONER'S BRIEF SUBMITTED TO THE MICHIGAN COURT OF APPEALS.

* * *

VI. *LIMITATIONS ON LEGISLATIVE AUTHORITY INVALIDATE THE APPELLEE'S LEGAL POSITION.*

Even *Wallin*, supra, notes, "It is true, of course, that the Legislature cannot change a testator's will or the intent of a testator by a statute adopted after the testator's death." In this case, the Petitioner-Appellee seeks to vest the Legislature with just such excessive authority. Her claim is based entirely on an improper retrospective application of *1966 PA 128*. If that statute had not been enacted, the Leggett wills would certainly have been interpreted in accordance with their plain meaning as of the date of death and Petitioner would be excluded from benefits. Under *Graham*, supra, and *Butterfield*, supra, the legal meaning of "issue" would be identified with the Testators' intent as a matter of law and Petitioner-Appellee would have no claim. Her claim arises only from a statute which cannot properly be applied first to create a need for construction of the wills and then to set forth a retroactive change in the rule of construction to change the previously established class of beneficiaries. This is simply beyond the limits of authority of the Legislature.

* * *

5. PETITIONER'S MOTION FOR REHEARING, SUBMITTED TO THE MICHIGAN SUPREME COURT.

* * *

DEFENDANTS-APPELLEES' MOTION FOR REHEARING

Defendants-Appellees move for rehearing under MCR 7.313(D), and affirm:

1. The Supreme Court opinion filed on December 5, 1985, reversed a unanimous decision of the Court of Appeals and significantly changed a longstanding principle of law as set forth in *In re Graham Estate*, 379 Mich 224, 150 NW2d 816 (1967).

2. The Supreme Court opinion deprives the testators and the Defendants-Appellees as their designated beneficiaries of property rights without due process of law by permitting the legislature to change the meaning of dispositive words contrary to US Const, AM XIV, Sec 1 and Mich Const 1963, Art I, Sec 17.

3. The Supreme Court opinion places in jeopardy the right of persons to rely upon the meaning of legal terms of art established by the Supreme Court in its decisions, and would permit the legislature to deprive persons of property without due process of law by changing the meaning of words.

4. Words used in legal documents must be given the meaning in effect when they are used because it is impossible for draftsmen to anticipate changes in statutory definitions or rules of construction.

5. The judicial system requires the use of legal terms of art such as "issue" which have precise legal meanings when they are used as a concise expression of intent. If the meaning of such words can be changed by rules of construction it will become necessary for draftsmen to

fully explain the legal meaning of all terms used in documents because of the possibility of future legislative action and traditional forms and styles of legal writing will no longer be adequate.

* * *

APPENDIX F

MICHIGAN STATUTORY PROVISIONS INVOLVED

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1. *1957 PA 255; MCLA 710.9; MSA 27.3178(549).*
2. *1966 PA 128; MCLA 700.128; MSA 27.5128.*
3. *1974 PA 296; MCLA 710.60; MSA 27.3178(550.60).*

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1. 1957 PA 255; MCLA 710.9; MSA 27.3178(549)

710.9 Same; duties and rights of foster parents; child as heir at law of adopting parents and their kindred, natural parents; custody

Sec. 9. Upon the entry of the order of adoption, such child shall, in case of a change of name, thereafter be known and called by said new name, and the person or persons so adopting said child shall thereupon stand in the place of a parent or parents to such child in law, in all respects as though the adopted child had been the natural child of the adopting parents, and be liable to all the duties and entitled to all the rights of parents thereto. Thereupon there shall be no distinction in any way between the rights and duties of natural children and adopted children, and such child shall thereupon become the heir at law of such adopting person or persons, as well as the heir at law of the lineal and collateral kindred of the adopting person or persons, and entitled to inherit property from such person or persons in accordance with the law of descent and distribution of this state: Provided, That nothing herein shall affect his right to inherit from or through his natural parents. On the death of the adopting parents, custody of the

adopted child shall be determined as though the child was natural born of the adopting parents. As amended 1955, No. 84, § 1, Imd. Eff. May 26; P.A.1957, No. 255, § 1, Eff. Sept. 27.

• • •

2. 1966 PA 128; MCLA 700.128; MSA 27.5128

700.128 Adopted persons, construction of terms in trust or will

Sec. 128. In the construction of a trust agreement or will, whether executed on, before, or after June 23, 1966, the term "child", "grandchild", "issue", "heir", "descendant", "beneficiary" or other equivalent term shall be construed to include any adopted person and his descendants whether natural or adopted unless a contrary intention appears by the terms of the instrument or unless the estate devised to the "child", "grandchild", "issue", "heir", "descendant", "beneficiary" or equivalent person vested before June 23, 1966, in an already ascertained person or persons who have an immediate indefeasible right of enjoyment or a present indefeasible fixed right of future enjoyment in the estate.

P.A.1978, No. 642, § 128, Eff. July 1, 1979.

• • •

3. 1974 PA 296; MCLA 710.60; MSA 27.3178(550.60)

710.60 Effect of order of adoption

Sec. 60. (1) After the entry of the order of adoption, the adoptee shall, in case of a change of name, be known and called by the new name. The person or persons adopting the adoptee shall thereafter stand in the place of a parent or parents to the adoptee in law in all

respects as though the adopted person had been born to the adopting parents and shall thereafter be liable for all the duties and entitled to all the rights of parents.

(2) After entry of the order of adoption there shall not be any distinction between the rights and duties of natural progeny and adopted persons, and the adopted person shall become an heir at law of the adopting parent or parents, and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, an adopted child shall no longer be an heir at law of a parent whose rights have been terminated under this chapter or chapter XIIA[1] or the lineal or collateral kindred of that parent, nor shall an adopted adult be an heir at law of a person who was his or her parent at the time the order of adoption was entered or the lineal or collateral kindred of that person, except that a right, title, or interest vesting before entry of the final order of adoption shall not be divested by that order.

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1760

In The

Supreme Court of the United States

October Term, 1985

IN THE MATTER OF THE ESTATES OF
JOHN W. LEGGETT, Deceased, and
GRACE F. LEGGETT, Deceased.

RUDOLPH J. PAPALINI and JACQUELINE COWL,
Petitioners,

v.

VASANTI FERRANDO FITHIAN,
Respondent.

BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

DAHLBERG, MALLENDER & GAWNE, P.C.
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QUESTIONS PRESENTED

I.

WHETHER THIS COURT HAS JURISDICTION.

II.

WHETHER THE STANDARDS OF RULE 17
FOR ISSUANCE OF THE WRIT HAVE BEEN SATISFIED.

III.

WHETHER DENIAL OF DUE PROCESS EXISTED.

IV.

WHETHER THE REQUIREMENTS OF RULE 28.4(c)
OF THIS COURT HAVE BEEN MET.

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STATEMENT OF THE CASE

The wills of John W. Leggett (who died in 1939) and Grace F. Leggett (who died in 1944) provided in relevant part as follows:

> "(e) The trustee shall pay over the net income of the trust estate quarterly or oftener, in its discretion, as follows:
>
> "(1) To my daughters, Wilhelmina L. and Annabell L. in equal shares.

"(2) Upon the death of one of my daughters, one-half to the surviving daughter and one-half to the issue of the deceased daughter, per stirpes, failing such issue to the surviving daughter.

"(3) Upon the death of the said surviving daughter, to my then living issue per stirpes."

Annabell L. Papalini, one of the Leggett daughters, had two children, the petitioners: Jacqueline Cowl and Rudolph J. Papalini. Wilhelmina Ferrando, the other Leggett daughter, had a single child, the respondent, Vasanti F. Fithian, duly adopted in 1940.

Upon the death of Annabell L. Papalini in 1974, the petitioners became income beneficiaries under paragraph (e)(2) of the Leggett wills.

In 1981, Wilhelmina L. Ferrando died. The Fithian petitions, asserting that respondent was issue under the foregoing provisions, were filed in the Oakland County Probate Court, which granted the Fithian petitions on June 17, 1982. The Court applied the statute (MCLA 700. 128; MSA 27.5128) and held that respondent is "issue" under the wills of John W. and Grace F. Leggett and entitled to receive one-half of the net income from the trust, leaving the other half to be divided between the petitioners. The opinion of the Probate Court is Exhibit C to the petition.

On appeal, the Michigan Court of Appeals reversed the decision of the Oakland County Probate Court. Its opinion is Exhibit B to the petition. The opinion does not address any constitutional issue or federal question.

The Supreme Court of Michigan in a unanimous decision reversed the decision of the Court of Appeals.

Its opinion is Exhibit A to the petition. The opinion does not address any constitutional issue or federal question.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION.

A. The Case Concerns Only Michigan Law.

The true substance of the petition rests on the assertion that an earlier decision of the Supreme Court of Michigan (*In Re Graham Estate*, 379 Mich 224; 150 NW2d 816 (1967)) so fixed the meaning of the term "issue" as used in wills executed in the 1930's as to create a "property interest" deserving Fourteenth Amendment constitutional protection, notwithstanding a later statute which provided that ". . . the term . . . issue . . . shall be construed to include any adopted person . . .". MCLA 700.128; MSA 27.5128.

The matter is stated by the petitioners as follows at p. 4 of the petition:

> "This case concerns the relationship between the rule of construction set forth in MCLA 700.128; MSA 27.5128 and the establishment of fixed dates for the definition of words set forth in *In Re Graham Estate*, 379 Mich 224; 150 NW2d 816 (1967)."

Since both the statute and the case are Michigan law, there is clearly no federal question.

Indeed, the entire substantive argument of the petitioners refers only to *Michigan* cases. No citation is made of any support to suggest that the Supreme Court of Michigan cannot determine the scope and effect of its own earlier decisions.

B. A Federal Question Was Not Raised Below.

There was no citation of the Fourteenth Amendment to the Constitution of the United States in any material presented to the Probate Court in connection with its original determination (Appendix E-3), nor was there any reference by that Court to the Fourteenth Amendment to the Constitution of the United States in its opinion (Appendix C). There was no citation of the Fourteenth Amendment to the Court of Appeals (Appendix E-4), nor any reference by the Court of Appeals to *any* constitutional issue, including any federal constitutional issue (Appendix B).

Petitioners did not refer to the Fourteenth Amendment to the Constitution of the United States in any materials filed with the Supreme Court of Michigan prior to its decision, which made no mention of the Fourteenth Amendment or *any* constitutional claim (Appendix A).

A reference to the Fourteenth Amendment appears only on the filing of a Motion for Rehearing, at which time the totality of the presentation by petitioners on this point was as follows:

> "The Supreme Court opinion deprives the testators and the Defendants-Appellees as their designated beneficiaries of property rights without due process of law by permitting the legislature to change the meaning of dispositive words contrary to US Const, AM XIV, Sec 1 and Mich Const 1963, Art I, Sec 17."

The attempt by petitioners to comply with Rule 21(h) of this Court (Appendix E) shows that, in fact, until the filing of the Motion for Rehearing in the Supreme Court of Michigan, petitioners did not refer to or invoke the Fourteenth Amendment to the Constitution of the

United States, nor assert whatever constitutional principle is being asserted by the petition filed herein.

Article I, Section 17 of the Constitution of the State of Michigan contains language essentially similar to that of the Fourteenth Amendment to the Constitution of the United States, insofar as due process is concerned, as follows:

> "No person shall be . . . deprived of life, liberty or property, without due process of law."

Accordingly, references to constitutionality do not automatically suggest violation of the federal constitution. An assertion that an Act is "unconstitutional" (made in the Probate Court but not in the Court of Appeals or the Supreme Court of Michigan, until after its decision) hardly invokes the Fourteenth Amendment.

This Court said in *Webb* v *Webb*, 451 US 493; 68 L Ed 2d 392; 101 S Ct 1889 (1981) at 451 US 496-7:

> "It is a long-settled rule that the jurisdiction of the Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state systems."

There was no presentation whatever of a federal question to the courts below, and there is no jurisdiction.

C. If A Federal Question Was Raised, It Was Not Timely Raised.

If there was any federal question presented, it was not timely brought forward to justify the jurisdiction of this Court. Certainly, reference *after* the decision of the Michigan Supreme Court is not timely.

The failure to cite or argue *any* constitutional point before the Michigan Supreme Court (until mere mention in the Motion for Rehearing) is an effective abandonment of the proposition.

In summary, it seems clear that no federal question exists, or that if any federal question exists it was not timely raised. If a federal question exists and was timely raised, it was on the basis of assertions of a vested interest on the part of the petitioners, which assertions were abandoned by the petitioners at the level of the Court of Appeals and of the Supreme Court of Michigan.

II.

THERE IS NO PROTECTED INTEREST.

There is no basis on which it could be asserted that long-deceased testators have a protected federal constitutional right which can affect the application of state law to the interpretation of their wills. No protected interest can exist in a testator deceased forty years. In a case concerning property (as this does), no property interest can exist in such a testator.

There is no showing of any protected property interest on the part of the petitioners. Any claim of the petitioners derives solely from the wills which were being construed below, and there is no property interest in the petitioners unless the wills are held to create such an interest. The whole subject was clearly dealt with in *Board of Regents* v *Roth*, 408 US 564; 33 L Ed 2d 548; 92 S Ct 2701 (1972), as follows:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent

> source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

It is, of course, Michigan law which determines whether petitioners have a protected property interest. Petitioners have been present in three Michigan courts, represented by counsel, and have had full hearing.

Petitioners seek to ground their asserted property interest on the 1967 decision of the Michigan Supreme Court in *Graham, supra,* which that same court in this case has held *not* to be applicable or controlling under Michigan law. There cannot be a protected interest without applying Michigan law (and the Supreme Court of Michigan has done so).

The opinion of the Supreme Court of Michigan makes very clear that the judicial determination upon which petitioners rely was pursuant to a common law rule of construction, which in this instance has been modified by a statutory rule of construction.

The highest court of Michigan has held that petitioners have no property interest under Michigan law. There is no separate source of entitlement claimed, or which could be claimed.

Petitioners claimed in the Probate Court that their interests under the wills herein involved constituted vested interests. Had there been a vested interest, the property rights of the petitioners would have been fully protected by the express terms of the statute.

The contention that petitioners had a vested interest was disposed of by the Probate Court, and was not advanced again by the petitioners. The foundation of any claim of a vested property interest justifying protection under the statute, the Michigan Constitution, or the United States Constitution is accordingly missing, and

was abandoned by the petitioners in their presentations to the Court of Appeals and to the Supreme Court of Michigan.

To the degree that the constitutional position of the petitioners was founded upon a claim of vested interest, it is clear that the abandonment of any subsequent reference to any vested interest on the part of the petitioners is an abandonment of the constitutional claim as well.

In any case, the Supreme Court of Michigan found that no interest vested in petitioners (Appendix A-6), while such an interest *had* vested under the facts of *In Re Graham Estate, supra.*

III.

THE PETITION DOES NOT MEET THE STANDARDS OF RULE 17.1(b).

Assuming that a federal question of some sort could be discerned under the petition, it is clear that the standards set forth in Rule 17.1(b) have not been met.

That Rule provides in part as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals."

There is no showing, nor any pretense of a showing, that the decision of the Michigan Supreme Court has

decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals. Indeed, there is no citation of any such opinion asserted to be in conflict with the decision of the Supreme Court of Michigan. Clearly, there can be no such case, among other reasons because the purported federal question put forward here by petitioners was not advanced before the Michigan Supreme Court (and was accordingly not considered in its opinion).

Assuming, *arguendo*, that the decision of the Supreme Court of Michigan decided a federal question, we are unaware of any decisions of a state court of last resort or of a federal court of appeals which is in conflict. The decided cases are not in conflict with the result of the Michigan decision. Indeed, both by way of applying a common law rule, and applying a statutory rule of construction, the courts of a number of states have reached the same result as the Michigan court. See, for example:

- *In Re Coe*,
  42 NJ 485; 201 A2d 571 (1964)
- *In Re Estate of Tafel*,
  449 Pa 442; 296 A2d 797 (1972)
- *In Re Patrick's Will*,
  259 Minn 193; 106 NW2d 888 (1960)
- *Johns* v *Cobb*,
  402 F2d 636 (US App DC, 1968)
- *Peele* v *Finch*,
  284 NC 375; 200 SE2d 635 (1973)
- *Prince* v *Nugent*,
  93 RI 149; 172 A2d 743 (1961)

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Rule 17.1(c) of this Court contemplates the possible grant of the writ where "a state court . . . has decided

an important question of federal law which has not been, but should be, settled by this Court . . .".

The interpretation and application of wills is uniquely a matter of state law, and so regarded by the Supreme Court of Michigan in this case. It permitted a statutory modification of a common law rule of construction.

In the instant case, the determination of the scope and application of *In Re Graham Estate, supra,* a Michigan case *not* involving a federal constitutional question, is especially a proper area for consideration *solely* by a *Michigan* court. Decision as to scope of a Michigan decision on Michigan law can hardly raise an important federal question.

There is no important question of federal law here. The petition having failed to meet the standards of Rule 17.1(c) of this Court, the petition should be denied.

V.

THE STATUTE IS NOT BEYOND THE POWERS OF THE LEGISLATURE.

Clearly, the statute in issue makes provision for the protection of vested interests, by its express terms, and could not be held constitutionally infirm in any case.

The application of a comparable statute was carefully analyzed in *Peele* v *Finch, supra,* as follows:

> "Clearly the purpose of the legislature in adding G.S. Section 48-23 Par(3) enacted almost immediately after the decision of this court in Thomas v Thomas, supra, was to change the law as there declared. The express provision of this statute is that in any will the word 'issue' shall be held to include any adopted person, unless the contrary

plainly appears by the terms of the will itself. It is also expressly provided by the statute such rule of construction shall apply whether the will as executed before or after the final order of adoption and irrespective of whether the will was executed before or after the enactment of the statute.

The terms of the statute being clear, no construction of its provisions by this court is required . . . In such event, it is our duty to apply the statute so as to carry out the intent of the legislature irrespective of any opinion we may have as to its wisdom or its injustice to the deceased testator unless the statute exceeds the power of the legislature under the constitution . . .

It is elementary that the state legislature, unlike the Congress of the United States, has all the legislative powers of the people of North Carolina themselves except insofar as such power is taken from it by the state constitution . . . Of course, state action prohibited by a provision of the United States Constitution is beyond the power of the people or their representatives in the legislature.

We find no provision in either the state constitution or the federal constitution which takes from the legislature the power to do what the legislature clearly undertook to do in the enactment of G.S. Section 48-23(3).

At the time of the enactment of this statute, no brother or sister of Laura Brown Finch and no issue of a deceased brother or sister had any vested interest in the property in question, their rights at that time being contingent as above

> noted. Retrospective statutes destroying or diminishing contingent interests in property do not per se deprive the holder thereof of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States or Article I Section 19 of the Constitution of North Carolina, or violate any other constitutional limitation upon legislative power . . ."

In the instant case, the Michigan Supreme Court held that the interests of the petitioners were not vested:

> "In the instant case, because no 'contrary intention appears *by the terms* of the instrument', (emphasis added) and because, in contrast with *Graham, supra,* the estate devised to the issue of Wilhelmina did not 'vest' befor June 23, 1966, in an already ascertained person who had an 'indefeasible' right of enjoyment, the statutory rule of construction set forth in § 128 governs."

There is no reference in the petition to *any* case which could be read in *any* way to apply any Fourteenth Amendment limit to the powers of the Michigan Legislature to adopt the statute here.

There is accordingly no support for the granting of any relief to the petitioners, and the petition should be denied.

VI.

THE PETITION DOES NOT COMPLY WITH RULE 28.4(c) OF THIS COURT.

This case concerns the application in 1981 of a 1966 Michigan statute (MCLA 700.128; MSA 27.5128) specifying that the term "issue" in wills executed on, before and after that date is to be construed to include adopted persons. The statute does not, by its terms, apply where

interests had vested prior to the statute's adoption. The Supreme Court of the State of Michigan applied the statute in favor of respondent as the adoptive "issue" of the testators.

It is not clear from the petition what the asserted federal question is. If the challenge is to the statute, petitioners have failed to comply with Rule 28.4(c) of this Court. There is no statement in the petition of a clear-cut challenge to the statute, but Question III of the questions presented by the petitioners reads as follows:

> "Whether the Michigan Legislature exceeded its constitutional authority by enacting a statute which purports to change the meaning of the term 'issue' in the wills of testators who died prior to its enactment."

and a portion of the conclusion of petitioners suggests an asserted constitutional infirmity in the statute (Petition, p. 13):

> "Since the term 'issue' was unambiguous in the Leggett wills, and became fixed in meaning on the dates of their death, a rule of construction subsequently enacted cannot change the meaning of their wills without violating the Constitution."

The petition should be denied for failure of compliance with Rule 28.4(c).

CONCLUSION

The petition should be denied for lack of jurisdiction, absence of a federal question, lack of *any* showing or attempted showing of compliance with the standards of Rule 17, failure to make *any* showing of authority sup-

porting the alleged constitutional defect, and failure of compliance with Rule 28.4(c).

Respectfully submitted,

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